

SOUTHERN ENVIRONMENTAL LAW CENTER

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August 7, 2019

VIA FOIAonline¹

Gayla Mendez
Regional Freedom of Information Officer
U.S. Environmental Protection Agency Region 4
AFC Bldg., 61 Forsyth Street, S.W., 9th Flr. (4PM/IF)
Atlanta, GA 30303-8960

RE: Freedom of Information Act Request: Documents Related to the Superfund Cleanup at the U.S. Department of Energy's Oak Ridge Reservation

Dear Ms. Mendez:

Under the Freedom of Information Act (FOIA),² as amended, the Southern Environmental Law Center (SELC) requests the following documents that relate to the Superfund cleanup at the Department of Energy's (DOE) Oak Ridge Reservation and are not already publicly available on the Tennessee Department of Environment and Conservation's (TDEC) website:³

1. The "Email dated October 26, 2018 from Jay Mullis (DOE Oak Ridge EM Manager) to Trey Glenn (Region 4 Regional Administrator)," referenced in the March 21, 2019 letter from former U.S. Environmental Protection Agency (EPA) Acting Region 4 Administrator Mary S. Walker.⁴
2. From February 2016, to the date upon which this request is processed, all correspondence and email correspondence exchanged within the EPA regarding the dispute and/or the subject matter of the dispute that the EPA formally initiated on August 24, 2018.⁵
3. From September 2011, to the date upon which this request is processed, all documents, correspondence, and email correspondence exchanged within the EPA regarding "the model used by DOE-OR to predict postconstruction groundwater

¹ <https://foiaonline.gov/foiaonline/action/public/home>

² 5 U.S.C. § 552.

³ <https://www.tn.gov/environment/program-areas/rem-remediation/rem-oak-ridge-reservation-clean-up/emdf/emdfdocuments.html>

⁴ Attachment (Att.) 1, Letter from Mary S. Walker, EPA, to John A. Mullis II, DOE, & David W. Salyers, TDEC, Mar. 21, 2019, n.12, at pg. 3 [hereinafter "EPA Formal Dispute Position"].

⁵ See Att. 2, Letter from Constance A. Jones, EPA, to Chris P. Thompson, TDEC, and Jay A. Mullis, DOE, Aug. 24, 2018 [hereinafter "EPA Formal Dispute Initiation"] (initiating dispute).

levels at the [proposed Environmental Management Disposal Facility (EMDF)],”⁶ and/or groundwater conditions at the proposed EMDF.

4. From September 2011, to the date upon which this request is processed, all correspondence and email correspondence exchanged within the EPA regarding waste acceptance criteria, including an analytical limit for mercury co-contamination, for the proposed EMDF.⁷
5. From September 2011, to the date upon which this request is processed, all correspondence and email correspondence exchanged within the EPA regarding site characterization for the proposed EMDF.⁸
6. From September 2011, to the date upon which this request is processed, all correspondence and email correspondence exchanged within the EPA regarding “perpetual financial assurance to ensure (1) compliance with applicable or relevant and appropriate requirements (ARAR’s) and (2) long-term protectiveness are maintained at the proposed Environmental Management Disposal Facility (EMDF).”⁹
7. From September 2011, to the date upon which this request is processed, all correspondence and email correspondence exchanged within the EPA regarding the design, construction, and operation of the Environmental Waste Management Facility landfill (EMWMF landfill) as it relates to the proposed EMDF.¹⁰
8. From September 2011, to the date upon which this request is processed, all correspondence and email correspondence exchanged within the EPA regarding performance assessments for the proposed EMDF.¹¹

⁶ Att. 3, Letter from Chuck Head, TDEC, to David Adler, DOE, Jul. 8, 2019, at 4 [hereinafter “TDEC Groundwater Conditions Letter”]; Att. 4, Letter from Carl R. Froede, Jr., EPA, to John Michael Japp, DOE, Jul. 30, 2019; Att. 5, Letter from Virginia H. Dale, Advocates for the Oak Ridge Reservation (AFORR), to John Michael Japp, DOE, Dec. 3, 2018 [hereinafter “AFORR Comment Letter”]; Att. 6, Comments from Mark Watson, City of Oak Ridge, to John Michael Japp, DOE, at the Public Hearing on the U.S. Department of Energy’s Proposed Plan for the Disposal of Oak Ridge Reservation Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Waste, Nov. 7, 2018 [hereinafter “City of Oak Ridge Comments”]. Documents may also refer to the EMDF as the “CERCLA Disposal Facility” or “CDF.”

⁷ EPA Formal Dispute Position; TDEC Groundwater Conditions Letter; AFORR Comment Letter; City of Oak Ridge Comments; Att. 7, Letter from Axel C. Ringe, Tennessee Chapter of the Sierra Club, to John Michael Japp, DOE, Dec. 10, 2018 [hereinafter “Sierra Club Comment Letter”].

⁸ See Att. 8, Dispute Resolution Agreement between DOE, EPA, and TDEC (Dec. 7, 2017) (discussing the “site characterization” for the proposed EMDF).

⁹ Att. 9, Letter from Randy C. Young, TDEC, to John Michael Japp, DOE, Mar. 4, 2019.

¹⁰ See TDEC Groundwater Conditions Letter (using the groundwater conditions at EMWMF to explain TDEC’s concerns about preventing waste from the EMDF landfill being released to groundwater).

¹¹ TDEC Groundwater Conditions Letter; AFORR Comment Letter; City of Oak Ridge Comments; Sierra Club Comment Letter.

9. From September 2011, to the date upon which this request is processed, all correspondence and email correspondence exchanged within the EPA regarding composite analysis for the proposed EMDF.¹²
10. From September 2011, to the date upon which this request is processed, all correspondence and email correspondence exchanged within the EPA regarding field sampling for the proposed EMDF.¹³
11. From September 2011, to the date upon which this request is processed, all correspondence and email correspondence exchanged within the EPA regarding a record of decision on the proposed EMDF.¹⁴
12. From February 2016, to the date upon which this request is processed, all correspondence and email correspondence exchanged within the EPA regarding the *Proposed Plan for the Disposal of Oak Ridge Reservation Comprehensive Environmental Response, Compensation, and Liability Act Waste* for the proposed EMDF.¹⁵
13. From September 2011, to the date upon which this request is processed, all correspondence and email correspondence exchanged within the EPA regarding the *Focused Feasibility Study (FFS) for Water Management for the Disposal of CERCLA Waste on the Oak Ridge Reservation*.¹⁶
14. From September 2011, to the date upon which this request is processed, all correspondence and email correspondence exchanged within the EPA regarding the *Remedial Investigation/Feasibility Study* for the proposed EMDF,¹⁷ including any the disputes related to the *Remedial Investigation/Feasibility Study*.¹⁸
15. From September 2011, to the date upon which this request is processed, all correspondence and email correspondence exchanged within the EPA regarding the proposed EMDF that are not captured by requests 1–14.

¹² TDEC Groundwater Conditions Letter; AFORR Comment Letter; City of Oak Ridge Comments; Sierra Club Comment Letter.

¹³ See Att. 10, Env't Prot. Agency & Tenn. Dep't of Env't. & Conservation, *Statement of Work: To Expedite Groundwater Characterization Central Bear Creek Valley Site 7c* (Aug. 8, 2017) (discussing the plan to characterize Bear Creek Valley for the proposed EMDF).

¹⁴ See Att. 11, Letter from Franklin E. Hill, EPA, to John A. Mullis, Jul. 25, 2019 (asking the DOE to postpone submittal of a draft record of decision).

¹⁵ U.S. Dep't of Energy, *Proposed Plan for the Disposal of Oak Ridge Reservation Comprehensive Environmental Response, Compensation, and Liability Act Waste* (2018).

¹⁶ U.S. Dep't of Energy, *Focused Feasibility Study for Water Management for the Disposal of CERCLA Waste on the Oak Ridge Reservation, Oak Ridge, Tennessee* (Feb. 2016) (draft two).

¹⁷ U.S. Dep't of Energy, *Remedial Investigation/Feasibility Study for Comprehensive Environmental Response, Compensation, and Liability Act Oak Ridge Reservation Waste Disposal* (Feb. 8, 2017) (draft five).

¹⁸ See Att. 12, Letter from John A. Mullis II, DOE, to Shari Meghreblian, TDEC, & Franklin Hill, EPA, May 22, 2017 (initiating formal dispute).

Potential parties associated with the requested documents, correspondence, and/or email correspondence include, but are not limited to, the following:

David G. Adler	Claudette T. Dorsey	Colby Morgan
Abe Almassi	Amy Fitzgerald	Tom Morgan
Doug Ammon	Pat Flood	Jay Mullins
John Blevins	David C. Foster	John A. Mullis II
Robert A. Binford	Carl Froede	Curt Myers
Andy Binford	Theodore J. Garrish	Melyssa Noe
John Blevins	Thomas Gebhart	Pete Osborne
Susan Parker Bodine	Mark Gilbertson	Roger B. Petrie
Barry Breen	Onis "Trey" Glann III	Julie Pfeffer
Martha Brook	Steve Goins	Annette Primrose
Dan R. Brouillette	Patricia Halsey	John M. Richards
Cathleen Burnette	V. Anne Heard	Don Rigger
Wendy Cain	Brian Henry	Beth Rowan
Richard Campbell	Michael D. Higgins	Tanya Salamacha
Susan M. Cange	Franklin E. Hill	Joy Sager
Randall Chaffins	Ashley Huff	David W. Salyers
Traci Cofer	John Michael Japp	Brad Stephenson
Colin Colverson	Constance (Connie) Jones	Steven Stout
Howard Crabtree	Shelley Kimel	Chris P. Thompson
Jeffrey L. Crane	Hannah Klein	Mary S. Walker
Thomas L. Cubbage, III	Ken Lapierre	John Waltowicz
Kristof Czartoryski	Amy R. Legare	Andrew R. Wheeler
Paul M. Dabbar	Heather Lutz	Anne Marie White
Jason Darby	Robert J. Martineau, Jr.	Laura Wilkerson
Amanda Daugherty	Dennis Mayton	Ron Woody
Gareth Davies	Shari Meghreblian	Eddie Worthington
Susan DePaoli	Gerry Middleton	Randy C. Young

FOIA requires a responding agency to make a "determination" on any request within twenty working days of receipt.¹⁹ The statute favors disclosure of records and instructs the agency to withhold information only in narrowly defined circumstances in which the agency can articulate a reasonably foreseeable harm protected by an exemption.²⁰ FOIA also requires the release of all reasonably segregable portions of a document that are themselves not exempt.²¹ Should the EPA refuse to provide the requested information, the EPA must inform SELC of the grounds for its refusal and the specific administrative appeal rights which are available.²² SELC

¹⁹ See 5 U.S.C. § 552(a)(6)(A)(i).

²⁰ See *id.* at § 522(a)(8)(A)(i).

²¹ See *id.* at § 552(b).

²² See *id.* at § 552(a)(6)(A)(i).

further requests preparation of a *Vaughn* index to facilitate evaluation of the completeness of the EPA's response.²³

FEE WAIVER REQUEST

SELC requests copies (electronic, if possible) without charge, or at a reduced charge, because reduction or waiver of fees would be in the public interest. A disclosure is in the public interest if: (1) it is likely to contribute significantly to public understanding of the operations or activities of the government; and (2) it is not primarily in the commercial interest of the requester.²⁴ The public interest standard of FOIA's fee waiver provision should be "liberally construed" in favor of waivers.²⁵ The goal of the statute is to avoid the "roadblocks and technicalities which have been used by various Federal agencies to deny waivers," and for the reasons discussed below, SELC's request for a fee waiver should be granted.²⁶

I. Disclosure is likely to contribute significantly to public understanding of the operations and activities of the government.

Four factors affect whether disclosure is likely to contribute significantly to public understanding of the operations or activities of the government, and all four factors weigh in favor of granting a fee waiver for this request.

First, "[t]he subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote."²⁷ This request seeks documents and correspondence directly related to studies, sampling plans, and proposed plans for the Superfund cleanup at Oak Ridge Reservation. The requested records directly relate to cleanup activities under a federal statute—Comprehensive Environmental Response, Compensation, and Liability Act—that would occur at a federal facility—DOE's Oak Ridge Reservation—under the direction of a federal agency—DOE—as supervised by another federal agency—the EPA—and the State of Tennessee. The connection between the requested records and government operations and activities is direct and clear.

Second, the information contained in the records must be "likely to contribute" to an understanding of government operations or activities," based on whether the records will "be meaningfully informative about government operations or activities."²⁸ The requested information would provide valuable information about the ongoing and proposed cleanup activities at the facility. Because the lead agency must consider state and community

²³ See *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) (index should include a detailed justification for claims of exemption, as well as specificity, separation, and indexing of documents).

²⁴ 40 C.F.R. § 2.107(l)(1).

²⁵ *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987); *Pederson v. Resolution Trust Corp.*, 847 F. Supp. 851, 855 (D. Colo. 1994); *Etlinger v. FBI*, 596 F. Supp. 867, 872 (D. Mass. 1984).

²⁶ *Pederson*, 847 F. Supp. at 855.

²⁷ 40 C.F.R. § 2.107(l)(2)(i).

²⁸ 40 C.F.R. § 2.107(l)(2)(ii).

comments,²⁹ it is vital that the public have a full, meaningful understanding of the proposed and ongoing operations and activities at Oak Ridge Reservation.³⁰

Third, the requested information “must contribute to the understanding of a reasonably broad audience of persons interested in the subject.”³¹ For this factor, “[a] requester’s expertise in the subject area and ability and intention to effectively convey information to the public will be considered.”³² SELC is a 501(c)(3) non-profit organization with over thirty years of experience disseminating public information regarding federal environmental regulatory and operations issues.³³ SELC generates and shares documents developed for the specific purpose of educating the public on particular issues. SELC speaks at community meetings on particular topics, including the management and cleanup of waste.³⁴ SELC also assists the public in locating information relating to particular topics by collecting and sharing relevant information and documents. SELC and several community groups submitted comments on the proposal.³⁵ Local communities in Anderson County and the City of Oak Ridge are actively engaged in the cleanup activities at Oak Ridge Reservation.³⁶ Moreover, an even broader public audience is interested in this cleanup because it is indicative of other cleanups occurring across the country as part of DOE’s broader management of its legacy nuclear waste sites.³⁷

Fourth, disclosure should likely “contribute ‘significantly’ to public understanding.”³⁸ As just discussed, the public—including local communities in Anderson County and the City of Oak

²⁹ 40 C.F.R. § 300.430(f)(3), (4), (6).

³⁰ Att. 13, Comment Letter from Christina I. Reichert, SELC, et al., to John Michael Japp, DOE, Dec. 10, 2018 [hereinafter “SELC et al. Comment Letter”]; Att. 14, Letter from Nate Watson & Christina I. Reichert, SELC, et al., to John Michael Japp, DOE, Aug. 1, 2019 [hereinafter “SELC et al. Letter re: Meaningful Public Comment”]; AFORR Comment Letter; City of Oak Ridge Comments; Sierra Club Comment Letter.

³¹ 40 C.F.R. § 2.107(l)(2)(iii).

³² *Id.*

³³ See <https://www.southernenvironment.org/about-selc>.

³⁴ <https://www.southernenvironment.org/cases-and-projects/coal-waste>.

³⁵ SELC et al. Comment Letter.

³⁶ See, e.g., Att. 15, Letter from Mark S. Watson & Kenneth R. Krushenski, City of Oak Ridge, to Jay Mullis, DOE, Jul. 12, 2019 [hereinafter “City of Oak Ridge July 2019 Letter”]; Att. 16, Letter from Ron B. Woody, Oak Ridge Reservation Communities Alliance (ORRCA), to Jay Mullis, DOE, Jul. 1, 2019 [hereinafter “ORRCA letter”]; Att. 17, Letter from Mark S. Watson & Kenneth R. Krushenski, City of Oak Ridge, to Jay Mullis, DOE, Franklin Hill, EPA, & Greg Young, TDEC, Apr. 2, 2019 [hereinafter “City of Oak Ridge April 2019 Letter”]; SELC et al. Comment Letter; SELC et al. Letter re: Meaningful Public Comment; AFORR Comment Letter; City of Oak Ridge Comments; Sierra Club Comment Letter; see also <https://www.youtube.com/watch?v=ZNqFX6VY7ME>; <http://www.ustream.tv/recorded/118536617>; <https://www.youtube.com/watch?v=FEgGoeteN-w>; <https://www.youtube.com/watch?v=tmDjIha3gOI>.

³⁷ Att. 18, U.S. Gov’t Accountability Office, Report to the Chairman of the Subcommittee on Strategic Forces, Committee on Armed Services, U.S. Senate, *Department of Energy: Program-Wide Strategy and Better Reporting Needed to Address Growing Environmental Cleanup Liability* (Jan. 2019); Att. 19, U.S. Gov’t Accountability Office, Report to the Subcommittee on Strategic Forces, Committee on Armed Services, U.S. Senate, *Nuclear Waste: DOE Should Take Actions to Improve Oversight of Cleanup Milestones* (Feb. 2019); Att. 20, U.S. Gov’t Accountability Office, Testimony Before the Subcommittee on Oversight and Investigations, Committee on Energy and Commerce, House of Representatives, *Department of Energy: Environmental Liability Continues to Grow, and Significant Management Challenges Remain for Cleanup Efforts* (May 2019).

³⁸ 40 C.F.R. § 2.107(l)(2)(iv).

Ridge³⁹ and the community groups that joined SELC's comments⁴⁰—have been actively engaged in the proposed EMDF. However, they do not have access to key information about the government's operations at the facility.⁴¹ Some documents are available on TDEC's website,⁴² but that compilation is incomplete. For example, a letter discussing the ongoing dispute between DOE, EPA, and TDEC cites an "Email dated October 26, 2018, from Jay Mullis (DOE Oak Ridge EM Manager) to Trey Glenn (Region 4 Regional Administrator)" that is said to describe DOE's position that it has exclusive authority to determine the standards that should govern releases of radioactive waste from DOE facilities.⁴³ That position is vitally important to public understanding of how protective the radioactive waste standards for the site would be because as EPA explained, DOE's proposed standards are not "generally protective within the framework of CERCLA."⁴⁴ In its comment on the Proposed Plan, SELC raised DOE's failure to disclose material information and the public's resulting inability to meaningfully comment on the Proposed Plan, and SELC more recently reiterated this concern due to DOE's continued failure to disclose key information about the proposed EMDF.⁴⁵

Therefore, these four factors show that disclosure is likely to contribute significantly to public understanding of government Superfund cleanup operations at Oak Ridge.

II. The request is not primarily in the commercial interest of SELC.

A fee waiver is in the public interest where the request is not in the requestor's commercial interest.⁴⁶ Two factors are evaluated for this determination, and both demonstrate that this request is not in SELC's commercial interest.

The first factor is "[t]he existence and magnitude of a commercial interest."⁴⁷ Commercial interest is evaluated per the definition of commercial use request, which is a request from a person "who seeks information for a use or purpose that furthers his/her commercial, trade, or profit interests."⁴⁸ As noted above, SELC is a 501(c)(3) non-profit organization dedicated to protecting the environment of the Southeast.⁴⁹ It does not have commercial, trade, or profit interests in seeking these disclosures.

³⁹ See, e.g., City of Oak Ridge July 2019 Letter; ORRCA letter; City of Oak Ridge April 2019 Letter; see also <https://www.youtube.com/watch?v=ZNqFX6VY7ME>; <http://www.ustream.tv/recorded/118536617>; <https://www.youtube.com/watch?v=FEgGoeteN-w>; <https://www.youtube.com/watch?v=tmDjIha3gOI>.

⁴⁰ SELC et al. Comments.

⁴¹ SELC et al. Letter re: Meaningful Public Comment.

⁴² TDEC, *EMDF Documents*, <https://www.tn.gov/environment/program-areas/rem-remediation/rem-oak-ridge-reservation-clean-up/emdf/emdfdocuments.html> (last updated July 26, 2019).

⁴³ EPA Formal Dispute Position.

⁴⁴ *Id.* at 9–10.

⁴⁵ SELC et al. Comments; SELC et al. Letter re: Public Comment.

⁴⁶ 40 C.F.R. § 2.107(l)(2)(i).

⁴⁷ 40 C.F.R. § 2.107(l)(3)(i).

⁴⁸ 40 C.F.R. § 2.107(b)(1).

⁴⁹ See <https://www.southernenvironment.org/about-selc>.

The second factor is the “primary interest in disclosure,” which indicates that fee waivers should be granted when “the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure.”⁵⁰ As SELC has no commercial interest in these disclosures, the public interest is clearly greater in magnitude.

Because of SELC's role in sharing information with the public and educating the public on the activity and operations of the government, disclosure of the requested materials will benefit the public through increased knowledge of the impact of DOE's cleanup of the legacy hazardous and radioactive waste at the Oak Ridge Reservation, as well as the EPA's and DOE's opinions on their authority to regulate radioactive waste. The requested disclosures are likely to contribute significantly to public understanding of government operations, and are not primarily in the requester's commercial interest. In short, this request satisfies the requirements for a fee waiver, which therefore should be granted.

Should SELC's request for reduced or waived fees be denied, we are prepared to bear the reasonable duplication and search costs necessary to fulfill this request. However, I request you contact me before processing this request if the fee is expected to be in excess of \$100.00. SELC reserves our right to appeal a fee waiver or reduction denial.

If you have any questions regarding this request, please feel free to contact me at (615) 921-9470 or creichert@selctn.org. I appreciate your prompt attention to this matter and look forward to receiving the public records requested.

Sincerely,



Christina I. Reichert

Attachments provided via ShareFile:

<https://southernenvironment.sharefile.com/share/getinfo/sabbc416325e436fb>

⁵⁰ 40 C.F.R. § 2.107(l)(3)(ii).